IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-119

JACK L. PICKENS,

Petitioner,

— vs. —

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No._____

JACK L. PICKENS,

Petitioner

vs.

STATE OF WISCONSIN,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

JACK L. PICKENS, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin entered in the above entitled case on March 18, 1976, rehearing denied April 26, 1976.

OPINIONS BELOW

The judgment of the Supreme Court of the State of Wisconsin is printed in Appendix A hereto, infra, page 3. The Order

of the Walworth County Court, Branch II, State of Wisconsin, is printed in Appendix A hereto, infra, page 4.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin (Appendix A, infra, page 3) was entered on March 18, 1976. A timely petition for rehearing was denied on April 26, 1976 (Appendix A, infra, page 1). The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1257.

QUESTIONS PRESENTED

I. On the entire record of this matter, was it an abuse of discretion and an abridgment of Petitioner's right to due process under the law as prescribed by the Fourteenth Amendment to the Constitution of the United States for the Trial Court to order the forfeiture of Petitioner's bail bond and deny the reinstatement thereof?

II. On the entire record of this matter, was it an abuse of discretion and an abridgment of Petitioner's right to due process under the law as prescribed by the Fourteenth Amendment to the Constitution of the United States for the Trial Court to deny Petitioner a change of venue on the grounds of prejudice?

III. On the entire record of this matter, was the Petitioner denied his right to due procees under the law as prescribed by the Fourteenth Amendment to the Constitution of

the United States because of the fact of the location of the alleged crime was not established to a reasonable degree of certainty to give the Trial Court jurisdiction pursuant to Section 939.03(1)(a) of the State of Wisconsin Statutes?

STATUTES INVOLVED

Amendment XIV to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 939.03 of the Wisconsin Statutes:

> "939.03 Jurisdiction of state over crime.
>
> (1) A person is subject to prosecution and punishment under the law of this state if:
>
> (a) He commits a crime, any of the constituent elements of which take place in this state; or

(b) While out of this state, he aids and abets, conspires with, or advises, incites, commands, or solicits another to commit a crime in this state; or

(c) While out of this state, he does an act with intent that it cause in this state a consequence set forth in a section defining a crime; or

(d) While out of this state, he steals and subsequently brings any of the stolen property into this state.

(2) In this section "state" includes area within the boundaries of the state, and area over which the state exercises concurrent jurisdiction under Article IX, section 1, Wisconsin constitution."

Section 971.22 of the Wisconsin Statutes:

"971.22 Change of place of trial. (1) The defendant may move for a change of the place of trial on the ground that an impartial trial cannot be had in the county. The motion shall be made at arraignment, but it may be made thereafter for cause.

(2) The motion shall be in writing and supprted by affidavit which shall state evidentiary facts showing the nature of the prejudice alleged. The district attorney may file counter affidavits.

(3) If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall order that the trial be held in any county where an impartial trial can be had. Only one change may be granted under this subsection. The judge who orders the change in the place of trial shall preside at the trial. Preliminary matters prior to trial may be conducted in either county at the discretion of the court. The judge shall determine where the defendant, if he is in custody, shall be held and where the record shall be kept."

STATEMENT

JACK L. PICKENS, Petitioner, and the Complainant, a married woman, in this action, spent some six hours alone together on the night of July 2, 1974. Although all the facts in this case certainly have not yet been established, it was set out in the preliminary examination of the Complainant that during this time the couple drank alcoholic beverages prepared by the Complainant, smoked marijuana, carried on extensive conversations and, although sexual intercourse without consent was alleged, the testimony supports the fact that there was enough rapport between the parties that the Petitioner climaxed outside of the alleged victim, at her request

and for her own prerogatives. (R. p. 26,27) The testimony at this preliminary further supports the fact that this crime, if it occurred, occurred in the State of Illinois. (R. p. 42, 43)

The Petitioner, because of the serious nature of this crime, desired to seek out competent counsel to represent him. After several appearances without counsel, the presiding Judge, Honorable John J. Byrnes, found the Petitioner indigent and appointed counsel to represent him. (R. 189) This was Mr. Harry Worth, of Elkhorn, Wisconsin. After several appearances Mr. Pickens decided that this attorney was not representing his best interests and decided to seek out other counsel. The Court dismissed Mr. Worth, at his and Mr. Pickens' request. (R. 133-149) Having a limited amount of money the Petitioner then sought out counsel of his own choosing and expense. After again appearing on several occasions without counsel, the Court instructed him that if he appeared again without counsel it would be by his own choice and he would not be heard later to complain that he was denied the right of counsel. Mr. Pickens appeared at the next hearing without counsel and again requested a continuance so that he might employ such. The Court refused such request, and informed Petitioner that he was appearing on his own behalf, which was his right. When the Petitioner informed the Court that this was not his intention and that he was trying to employ counsel, the Court, at the request of the District Attorney and in order that the record not be "contaminated", appointed

an attorney, Brian Reimer, of Delafield, Wisconsin, who happened to be in the Courthouse that day. (R. 121, 122). He was instructed that he was to act merely as some sort of instructor of law to Mr. Pickens as he presented his own defense. After vigorously objecting to working in this capacity, and on such short notice, Mr. Reimer was dismissed. (R. 151-166). This was on February 15, 1975. Mr. Pickens then attempted to employ Mr. Arthur Pelkind, of Chicago, Illinois, for his trial. However, the trial date of March 17, 1975 was by this time set down as unchangeable. Mr. Belkind's schedule could not conform to this, nor could local counsel be found in this time.

The above facts indicate that Mr. Pickens appeared many times without counsel. One such time was the pre-trial of March 10, 1975. At this hearing the time and date of trial was set forth in the record. At this hearing the date and time were set as 9:30 on March 17, 1975. However, the District Attorney requested that the time be changed to 1:30 due to other business that morning. The discussion then turned to other matters. When the Court reiterated the time for hearing, he added the phrase, "or as soon thereafter as counsel can be heard." The Petitioner, not being represented by counsel, was, of course, not familiar with this well used utterance. The Petitioner, knowing that the District Attorney was the only counsel there, was thereby led to believe that the Court was agreeing with this requested delay. (174-179). Thus, when the Petitioner left the Courthouse that day,

he believed that his trial was to be at 1:30 p.m. on March 17, 1975, and not at 9:30 a.m. This is what he relayed to his counsel, Mr. Belkind, as well as to his friends. No written stipulation nor order was drawn by the Court nor sent to Mr. Pickens.

When Mr. Pickens did not appear at the time set, the Court ordered his bail forfeited and set forth a bench warrant for his arrest. A squad car was sent to pick up Mr. Pickens. At the time of his apprehension that same morning, Mr. Pickens again stated his surprise to the squad officers that the hearing was to be at 9:30, as he was getting ready to be present at 1:30.

At this trial, which did get under way that same date, Mr. Pickens asked for another delay, since he could not get counsel for that time, but had employed Mr. Belkind, who would appear for him at a later date. The Court refused that request, and stated that he would have to appear without counsel. When Mr. Pickens objected and requested that he be allowed merely to call his attorney and discuss the law in this area so he might proceed in an informed manner, the Court refused even a phone call, indicating that the trial must proceed. (R 210-216)

Due to the anxiety of this proceeding and the fact that the Petitioner had been involved in a serious automobile accident the previous night, Mr. Pickens performed the selection of the first jurors, but was too ill to select the additional jurors. The Court ordered the bailiff to select the strikes for him. (R. 282).

On the next day Mr. Pickens was represented by Mr. Belkind, who informed the Court of the reasons for Mr. Pickens' alleged delay and moved the Court for a reinstatement of the bond. The Court refused. This motion, accompanied by numerous affidavits testifying as to the validity of total confusion in the situation was again made by Attorney Sydney Eisenberg, who was later obtained as local counsel. On the 28th of April this motion and the other motions of Attorney Eisenberg, including that of a change of venue due to prejudice and a motion for dismissal of the action for lack of jurisdiction under Sec. 939.03(1)(a) Wis. Stats., were denied. (R. 423-474). It was from the denial of these motions that the Petitioner appealed to the State of Wisconsin Supreme Court.

The State of Wisconsin Supreme Court dismissed Petitioner's Appeal on March 18, 1976 and on April 26, 1976 denied Petitioner's motion for reconsideration.

REASONS FOR GRANTING THIS WRIT

I. The Trial Court abused its discretion and denied Petitioner due process under the Fourteenth Amendment, by ordering the forfeiture of Petitioner's bail bond and denying the reinstatement thereof.

A. PETITIONER'S ACTIONS WERE NOT OF THE KIND THAT CALL FOR BOND FORFEITURE.

The "due process" clause of the Fourteenth Amendment, Section I forbids the

state from depriving any person of life, liberty and property without due process of law. Bloom v. State of Illinois, Ill. 1968, 88 S. Ct. 1477, 391 U.S. 194, 20 L. Ed. 2d 522. Further, actions of members of the state judiciary, when acting in their official capacity, and when the orders are enforced by the state constitute "state action" under this clause. Haley v. Troy, D.C. Mass. 1972, 338 F. Supp. 794.

Petitioner asserts that the action of the Trial Court in revoking his bail bond and denying its reinstatement denied him his right of due process of law because, with one minor exception when he was fifteen minutes late, the record will show that Petitioner appeared timely at all proceedings.

The Wisconsin Supreme Court has recognized the procedure whereby the bonding company or, in this case, the persons who put up the cash bond money, are given an opportunity to produce the accused within a given time period before revocation of bail. State vs. Summit Fidelity & Surety CO., 39 Wis. 2d 401 159 N.W. 2d 59 (1967). There were persons present at the Courthouse that morning who might have been able to render this type of assistance. If this procedure is discarded, as was within the power of the Trial Court, then the Petitioner was at least entitled to notice or a hearing on this matter. Latham vs. Casey & King Corporation, 23 Wis 2d 311 127 N.W. 2d 225 (1963). The Petitioner was given none of these safeguards in the termination

of his bond. The right to reasonable bail is based on the presumption of innocence and the right of personal liberty. Any denial or revocation thereof must meet the test of due process. Gaertner vs. State, 35 Wis 2d 159 150 N.W. 2d 370 (1967). The Trial Court, by the complete disregard for obtaining the person of the Petitioner, other than by a bench warrant, did not accord him his due process rights. As is pointed out in the record, a simple phone call would have been sufficient, the Petitioner being at home at the time. Even this courtesy was not extended to the Petitioner.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN SUSPENDING THE DEFENDANT'S BOND.

As is shown in the arguments that follow, the Trial Court, if it was not prejudiced, was at least more than properly concerned with getting this case tried. It must be remembered that it is the Petitioner's right to a speedy trial and the right to counsel. But it is only reasonable that it should be at his reasonable discretion to obtain a short amount of time in order to obtain counsel to meet with him for advice and counsel. Petitioner contends that the speedy trial concept so concerned the judge in this case that when Petitioner did not appear timely, he considered only getting the case to trial as quickly as possible. The fastest way was to order his arrest. Petitioner contends that it is simply unfair that in this year of electronics, 1975, the Court did

not even wish to take the time for a phone call, to determine why the Petitioner was late. Although speed is an important faction of any trial, it should not be put above the rights of the defendant. To do so would be tc deny the defendant rights he is guaranteed under the constitution.

The Term, "abuse of discretion," has been defined by this Court.

> "The term abuse of discretion exercised in any case by the trial court, as used in the decisions of courts and in books, implying in common parlance a bad motive or wrong purpose, is not the most appropriate. It is really a discretion exercised to an end or purpose not justified by and clearly against reason and evidence." Bernfeld vs. Bernfeld, 41 Wis. 2d 358; 365, 164 N.W. 2d 259 (1971).

It is the contention of the Petitioner that the ends that the trial court sought to meet, that of speediness of trial, in revocation of the bond were not proper in this trial. The proper purpose of bond revocation, that of finding the Defendant and bringing him to trial, without further efforts to locate him by other means, has no grounds in the evidence of this case.

C. THE TRIAL COURT ABUSED ITS DISCRETION AFTER HEARING THE EVIDENCE IN NOT REINSTATING THE BOND OF THE DEFENDANT.

The day after the revocation of the bail bond, Petitioner was obviously ill from the effects of his accident. A treating doctor found blood in his urine. He appeared with Attorney Belkind. One of the first things that Attorney Belkind attempted to do was to reinstate the bond. Evidence was then introduced indicating that Petitioner was not absconding. (R. 295-299) This motion was denied. (R. 304) It was then decided, due to the irrational questions asked by the Petitioner the previous day, and on the suggestion of the District Attorney and Attorney Belkind that the Petitioner be sent to a clinic to determine his competency to stand trial, as well as his physical condition. (R. 303-304) He was thus ordered to the State Hospital. The jury was dismissed. It was determined that Mr. Pickens was competent.

In the interim he had also obtained Mr. Eisenberg as local counsel. At the first hearing after the Petitioner was released from the State Hospital, Mr. Eisenberg moved the Court for a reinstatement of the bail. At this time several affidavits were presented, all indicating the mistake that Mr. Pickens had made due to the fact that he misunderstood the discussions of the pre-trial. His physical condition, alone, warranted understanding and compassion on the part of the learned trial court. Although no evidence was introduced to counteract this pile of affidavits, the judge refused to reinstate the bail bond, nor hear further testimony on the matter. (R. 389-414)

In all of this it is clear that the judge was piqued at the Petitioner for the delay before he heard the explanation. When

Petitioner failed to appear at the proper time, the judge punished him by revocation of his bond. The bond was not reinstated even after it was shown that the delay was due to a reasonable mistake, that the Petitioner did appear, that the trial started the same morning at 11:00 a.m. The jury was impaneled and utilized until Petitioner's competency and right to counsel were questioned by the Court himself. The fact remains that there was no valid reason to sustain the forfeiture of the bond. The use of process such as this is expressly disdained and forbidden by this Court. The case in point is State vs. Dickson, 53 Wis 2d 532 190 N.W. 2d 883 (1971). This case appears to be designed and "made to order" to prevent exactly the misunderstanding and miscarriage of justice which occured here. Therein the Court held:

> "The record shows that the contempt finding was imposed upon the client Dickson not because of his absence but because the judge was piqued when he discovered the unavailability of the state's witness made it impossible to try the case. State vs. Dickson, 53 Wis 2d 532, 549, 190 N.W. 2d 883 (1971)....The record evinces caprice constituting abuse of discretion."

It is the contention of the Petitioner that there were no valid reasons nor valid process initially justifying the termination of his bail bond, nor was there any reason other than hasty judgment for the later denial of reinstatement of said bond. The arbitrary loss of $2500.00 cash is monumental to the

people who pledged their life's savings to provide bail against what Petitioner considers an unfair charge against him.

II. THE TRIAL COURT ERRED IN NOT GRANTING A CHANGE OF VENUE OF THE GROUND OF PREJUDICE.

A. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER MOTION FOR A CHANGE OF VENUE.

The Petitioner in this action, after being released from the State Hospital and being found competent to stand trial, moved for a change in venue pursuant to Sec. 971.229(1) of the Wisconsin Statutes, which states:

> "The defendant may move for a change in the place of trial on the grounds that an impartial trial cannot be had in the county. The motion shall be made at arraignment, but it may be made thereafter for cause."

The Court after hearing this motion summarily denied the same.

Petitioner contends that pursuant to the mandates of the United States Supreme Court and this Court's ruling he should have been granted a change in the place of trial. The United States Supreme Court in Sheppard vs. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, (1966), held that where there is a reasonable likelihood that a fair trial cannot be had it is the

duty of the trial court to take some action, either a continuance until the threat abates or a transfer to another county. Further, this case states that it is the duty of the Appellate Court to make an independent survey of the circumstances when this issue is raised on appeal. The Wisconsin Supreme Court has also made reference to this area on many occasions, stating that if the evidence indicates a reasonable likelihood that a fair trial cannot be had it is an abuse of discretion to fail to grant a change of venue. Tucker vs. State, 56 Wis 2d 728, 202 N.W. 2d 897, (1972); McKissick vs. State, 49 Wis 2d 537, 182 N.W. 2d 282, (1971); State vs. Hebard, 50 Wis 2d 408, 184 N.W. 2d 156 (1970).

Petitioner cites two areas of prejudice which he believes gives rise to more than a reasonable likelihood that a fair trial could not and cannot be had. The first is prejudice of the Court and its officers and the second that of communtiy prejudice in general. Petitioner contends that because of the delays interposed by him at the early stages of this litigation the Court and the District Attorney were concerned only with getting the matter tried and not concerned in the least with his rights, particularly his supposed presumption of innocence. Several of the transcripts indicate this with particularity. See the footnotes attached hereto which are part of the transcripts from the hearing of March 17, 1975, held in Judge John J. Byrnes' chambers, Mr. Pickens being without counsel.

This mood of disdain and contempt for the Petitioner seemingly pollute nearly all

of the transcripts. Although it is at times impossible to maintain good will towards all men, when a good portion of a man's life is at stake, a magistrate who harbors these feelings should at least be aware of such and transfer the case or otherwise disqualify himself. Although prejudice is all to evident here, the trial court refused to recognize it.

The prejudice of the Court is only part of the problem however. Petitioner contends that the prejudice of the community also eliminates the possibility that a fair trial can be had in Walworth County. In State vs. Hebard, supra, this Court laid down the relevant factors in determining if community prejudice was present.

"Relevant factors in determining whether a motion for change of venue should have been granted by the trial court include: The inflammatory nature of the publicity concerning the crime; the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; the timing and specificity of the publicity; the degree of care exercised; the amount of difficulty encountered in selecting the jury; the extent to which the jurors are familiar with the publicity; the defendant's utilization of the challegens; both peremptory and for casue, available to him on voir dire; the participation of the state in the adverse publicity; and the severity of the

offense charged and the nature of the verdict returned. STATE vs. Hebard, supra at 426.

Since the jury selected in this case has been dismissed for other reasons many of the above mentioned factors are inapplicable. If venue remains in Walworth County however a new jury panel will have to be selected from the residents of that area. Petitioner contends that an impartial selection from an array so drawn would be impossible.

The whole case has been reported by all the local papers and the entire community is familiar with the actions of both the Petitioner and the judge. Affidavits attesting to such are in the record. Further more there is an extreme degree of community prejudice against the Petitioner and his friends the renders the selection of most any person in the community a biased selection. This adverse reaction is indicated in affidavits of personal friends of the Petitioner who have been thrown out of public bars, refused service and the like for no apparent reason. Based on all the evidence, a conclusion of community prejudice is virtually inescapable.

As cited earlier, by mandate of the United States Supreme Court, this Court has the duty to make an independant survey of the circumstances and if there is a reasonable likelihood that a fair trial cannot be had then a change of venue must be ordered. Shepard vs. Maxwell, supra. An actual showing of prejudice does not have to be

shown. Petitioner contends that based on the entire record, prejudice both of the Court and the community have been shown and therefore the test enumerated above is easily met.

III. THE TRIAL COURT ERRED IN DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION PURSUANT TO SEC. 939.03(1)(a).

A. THE PLACE OF THE ALLEGED CRIME WAS NOT ESTABLISHED AT THE PRELIMINARY OR ANY OTHER TIME AND THE EVIDENCE OBTAINED INDICATE THAT THE CRIME, IF IT OCCURRED, OCCURRED IN ILLINOIS.

At the preliminary hearing, testimony was elicited from the complainant in this action, that supports the conclusion that the alleged crime occurred on Bissel Road. The exact distance was only speculated and upon cross examination this speculation grew even more confused. The importance of this is the fact that, as is stated in the record, a portion of Bissel Road near the area of the alleged crime, enters Illinois. This is attested to by the official state maps and surveys of both states. When the issue of lack of jurisdiction was raised, the Court made no study nor did it reach any conclusion or ruling as to where the crime occurred. Hence this matter is still one of mere speculation. (R. 423-474)

This matter not being set forth in any greater detail, thus, is grounds for dismissal of the action since Petitioner contends the alleged crime occurred in Illinois. The Wisconsin Supreme Court has held that:

> "A preliminary hearing is a determination by a magistrate that further criminal proceedings are justified." Taylor v. State, 55 Wis 2d 168, 172, 197 N.W. 2d 805 (1972).

Since it was not established at the preliminary, to any degree of certainty that the crime occurred in Wisconsin, pursuant to Sec. 939.03(1)(a), the courts of this state have no jurisdiction. Petitioner asserts that for this reason there was not grounds for further proceedings and the case should have been dismissed. Furthermore, pursuant to testimony in the record, the crime occurred in Illinois and therefore should be dismissed in any event. The trial court therefore abused its discretion in denying Petitioner's motion for dismissal.

IV. CONCLUSION

The Trial Court denied Petitioner his due process rights in revoking Petitioner's bail bond and denying reinstatement thereof. Further abuse of discretion and denial of constitutional rights occurred in denying Petitioner's motion for change of venue because of prejudice and denying the motion for dismissal because of lack of jurisdiction. Therefore, Petitioner prays that a Writ of Certiorari be issued to the Supreme Court of the State of Wisconsin so that this Court can prevent a serious injustice in the infringement of Petitioner's rights under the United States Constitution.

Respecfully submitted,
EISENBERG & KLETZKE
Counsel for Petitioner

FOOTNOTES

210 THE COURT: Do you have any objections to any of those instructions?

MR. PICKENS: Well, the one objection is that I should get Arthur (Belkind) on the phone because here is my receipt if you wanted to see it.

THE COURT: I am not interested in that at the moment, Mr. Pickens.

MR. PICKENS: I did the best I could, Your Honor.

211 THE COURT: I am prepared to go ahead with your trial now. I will try my best to give you an absolutely fair trial. Mr. Read, do you have any objection to the instructions?

MR. READ: No, I have none. We are ready to proceed.

MR. PICKENS: I would like to call my attorney. I can't possibly go in there without knowing the law. I have retained him and paid him the money. He should be.....

THE COURT: (Interrupting) Is there anything further, Mr. Read?

MR. READ: No, I have nothing further, Your Honor.

THE COURT: Well, Mr. Pickens, we are going ahead. I have told you at least a half a dozen times that the trial would be this morning at 9:30 and that is it. So we are

ready to go. I want to tell you that I am going to bend over backwards to give you a fair trial, but I want you to understand that I am not going to allow you to make any speeches out there. You understand? If you object to some testimony, you may lodge your objection. Just briefly, in a few words, say you object for a certain reason. Now, you have the right to object to a question if you don't think it is proper; and if I overrule the objection the witness will be allowed to answer. If I sustain the objection the witness will not answer. Do you understand the procedure?

MR. PICKENS: Yes, but I am not going to say anything because I can't go ahead. I can't go without my lawyer. I am not trying to cause any problem. I did the best I could.

And later at the same hearing:

212 MR. PICKENS: Yes, but it is within the law to have a lawyer.

THE COURT: That is right. You are certainly entitled to have a lawyer, but that is your business. You have elected to proceed on your own.

MR. PICKENS: I have not. I don't want to proceed on my own.

THE COURT: We have got to proceed at this time, that is all there is to it.

MR. PICKENS: I can't handle this. I don't know all the fine points of the law.

213 THE COURT: Well, that is your business, Mr. Pickens.

We will proceed now.

And as the hearing ended and proceeded to trial the conversation took place.

216 MR. PICKENS: Anyway if you go over the examination of what was said on the transcripts of that day, you will find that he mentioned 1:30 a couple of times. Michele checked with the Clerk of Courts. They said it was 1:30. It wasn't 9:30. So I wasn't prepared. I don't have my files. My files are in the car. I have files on this that I wanted to get. I had to get the witness in here. I had to have Steve come from Montreal.

THE COURT: Mr. Pickens that is it. We are going to go ahead at this time.

MR. PICKENS: That is not fair to me.

THE COURT: I can't help it.

MR. PICKENS: But you have to. You are the Judge.

THE COURT: Let's go.

MR. PICKENS: But I can't. For the record it is against my will to go without a lawyer. Can I call him at least? I am entitled to that right. I would like to call him beforehand and let his office know what is happening to me.

THE COURT: Mr. Pickens we are ready to go right now.

MR. PICKENS: I would like to call my lawyer.

THE COURT: We are ready to go.

(Which concluded the conference in chambers)

APPENDIX

Office of the Clerk

S U P R E M E C O U R T

STATE OF WISCONSIN

Robert O. Uehling
clerk

Madison,
April 26, 1976

Sydney M. Eisenberg
Eisenberg & Kletzke
To 1131 West State Street
Milwaukee, WI 53233

Bronson C. LaFollette
Attorney General
114 East - State Capitol
Madison, WI 53702

James H. McDermott
Assistant Attorney General
123 West Washington Avenue - 317
Madison, WI 53702

Robert D. Read
District Attorney
111 Courthouse
Elkhorn, WI 53121

Sir: - The Court today announced decision in your case as follows:

75-216-CR - State of Wisconsin v. Jack L. Pickens

The court having considered the appellant's motion for reconsideration,

IT IS ORDERED the motion is denied.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court.

Office of the Clerk

S U P R E M E C O U R T

STATE OF WISCONSIN

Robert O. Uehling
clerk

Madison,
March 18, 1976

75-216-CR - State of Wisconsin v. Jack L. Pickens

The court having considered the state's motion to dismiss the appeal,

IT IS ORDERED the motion to dismiss is granted since the order appealed from is not appealable.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court.

STATE OF WISCONSIN	BR . II COUNTY COURT	WALWORTH COUNTY

STATE OF WISCONSIN,
Plaintiff,
vs.
JACK L. PICKENS,
Defendant.

ORDER FORFEITING BAIL AND
NOTICE OF APPLICATION
FOR JUDGMENT

File No. 33682

ORDER

It appearing from the records and files in this action that the defendant was released from custody upon his giving bail to secure his appearance in Court during the prosecution of this action as ordered from time to time by the Court, and it appearing that the defendent was ordered to appear in Court on the 17th day of March, 1975, at 9:30 A.M. o'clock, and upon the calling of the case in Court the defendant did not respond and was not personally present, and the Court being satisfied that the defendant was previously given due notice of the requirement of his appearance at that time,

IT IS DETERMINED that the defendant's failure to appear at the time appointed is a breach of the conditions of his bond, and

IT IS ORDERED that the bail of the defendant is forfeited.

Dated March 17, 1975

BY THE COURT,

John J. Byrnes

FILED
COUNTY COURT BR.2
March 18, 1975
SHERMAN S. STEWART
CLERK OF COURTS-WALWORTH CO.
BY: DELLA GUZMAN, DEPUTY

NOTICE

Notice of Application for Judgment in the Courtroom of the above Court in the Courthouse in Elkhorn, Wisconsin, at 9:00 A.M., on Monday, April 21, 1975

To Defendant Jack L. Pickens
Route 2
Lake Geneva, Wis. 53147

To Surety Jeanette Harris
3322 W. 64th Street
Chicago, Illinois

Take notice that at the time and place stated immediately above the district attorney of this county will apply to the Court for judgment of bail forfeiture to enforce liability against you for the amount of the bail and costs of this proceeding on which you have given bond and will move the Court for judgment against the defendant in the amount of $ 2,500.00 and against the surety in the amount of $ 2,500.00.

Dated March 18, 1975

Robert Read
District Attorney

I hereby admit service of the above Order and Notice and certify that copies thereof were mailed to each of the above named defendant and surety at the address shown above and that such address is the last address of each person ascertainable from the documents now in the file.

Date of mailing March 18, 1975

Della Guzman
(Deputy) Clerk of Courts

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-119

JACK L. PICKENS

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

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INDEX AND SYNOPSIS OF ARGUMENT

CASES CITED

CONSTITUTIONAL PROVISIONS

UNITED STATES STATUTES AND RULES

WISCONSIN STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-119

JACK L. PICKENS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Walworth County Court, Branch II, is unreported. Although an order of that court is printed at pages 4-5 of the petitioner's appendix, that order is not the order that was appealed to the Wisconsin Supreme Court. The opinion of the Wisconsin Supreme Court, dismissing the appeal from the Walworth County Court's order, is printed in petitioner's appendix, page 3. The opinion of the Wisconsin Supreme Court, denying the motion for reconsideration of its order dismissing the appeal, is printed in petitioner's appendix, pages 1-2.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. sec. 1257. Although petitioner has not cited the subsection of the statute under which he brings this action, it is apparently brought pursuant to 28 U.S.C. sec. 1257 (3) since it is denominated a "petition for writ of certiorari." However, this Court has no jurisdiction under that statute to review any of the questions alleged to be presented by this case since none of the questions was ever properly presented to or decided by the Wisconsin Supreme Court as a federal question. Rather, each of the questions was disposed of on the basis of state law.

QUESTIONS PRESENTED

The "Questions Presented" section of the petition lists three questions. As indicated, none of the questions is properly before this Court for review for the reasons stated above.

STATUTES INVOLVED

In addition to the constitutional and statutory provisions appearing in the petition (pages 3-5), the following statutes are pertinent to the present case:

Section 59.07 (80), Wis. Stats.:

> "**(80) BAIL BONDS.** The authority of the county board to remit forfeited bond moneys to the bondsmen or their heirs or legal representatives, where such forfeiture arises as a result of failure of a defendant to appear and where such failure to appear is occasioned by a justifiable cause, is hereby confirmed."

Section 270.53 (2), Wis. Stats.:

> "**(2)** Every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order."

Section 274.33, Wis. Stats.:

> "**274.33 Appealable orders.** The following orders when made by the court may be appealed to the supreme court:
>
> "**(1)** An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.
>
> "**(2)** A final order affecting a substantial right:
>
> (a) Made in special proceedings, without regard to whether the proceedings involve new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statutes which created the right, remedy or proceedings. or
>
> (b) Made upon a summary application in an action after judgment.

> "**(3)** When an order grants, refuses, continues or modifies a provisional remedy or grants, refuses, modifies or dissolves an injunction, sets aside or dismisses a writ of attachment, grants a new trial or sustains or overrules a demurrer, decides a question of jurisdiction, grants or denies a motion for stay of proceeding under s. 262.19, determines an issue submitted under s. 263.225, or denies an application for summary judgment, but no order of the circuit court shall be considered appealable which simply reverses or affirms an order of the civil court of Milwaukee county, unless the order of the civil court grants, refuses, continues, modifies or dissolves a provisional remedy or injunction.
>
> "**(3m)** A party on whose motion a new trial has been ordered may nevertheless appeal from such order for the purpose of reviewing a denial of his motion after verdict for judgment notwithstanding the verdict or to change answers in the verdict.
>
> "**(4)** Orders made by the court vacating or refusing to set aside orders made at chambers, where an appeal might have been taken in case the order so made at chambers had been made by the court in the first instance. For the purpose of appealing from an order either party may require the order to be entered by the clerk of record."

Section 969.13 (1) and (4), Wis. Stats.:

> "**969.13 Forfeiture.** (1) If the conditions of the bond are not complied with, the court having jurisdiction over the defendant in the criminal action shall enter an order declaring the bail to be forfeited."
>
> "**(4)** Notice of the order of forfeiture under sub. (1) shall be mailed forthwith by the clerk to the defendant and his sureties at their last addresses. If the defendant does not appear and surrender to the court within 30 days from the date of the forfeiture and within such period he or his sureties do not

satisfy the court that appearance and surrender by the defendant at the time scheduled for his appearance was impossible and without his fault, the court shall upon motion of the district attorney enter judgment for the state against the defendant and any surety for the amount of the bail and costs of the court proceeding. Proceeds of the judgment shall be paid to the county treasurer. The motion and such notice of motion as the court prescribes may be served on the clerk who shall forthwith mail copies to the defendant and his sureties at their last addresses."

STATEMENT OF CASE

Petitioner filed a notice of appeal with the Walworth County Court on May 13, 1975. The notice stated that the appeal was taken from "the Order entered in the above entitled action on the 28th day of April, 1975, by the HONORABLE JOHN J. BYRNES, County Judge, Walworth County, Branch II, Elkhorn, Wisconsin" (R. 420). A search of the record discloses, however, that no such order was ever entered. The county court did enter a written order forfeiting petitioner's bail on March 17, 1975. That order was never appealed to a higher court. Although the record shows that the county court, on April 28, 1975, orally denied several motions of the petitioner, these oral orders were never reduced to writing. Thus, when petitioner filed his brief on appeal to the Wisconsin Supreme Court, the State responded by filing a motion to dismiss. Two of the grounds in support of the motion were that 1) the orders were nonappealable since they had never been reduced to writing; and 2) each of the orders was, by its very nature, nonappealable under previous decisions of the Wisconsin Supreme Court. The Wisconsin Supreme Court never reached the merits of the issues raised in

the petitioner's brief but instead granted the State's motion to dismiss. In its written order of March 18, 1976, dismissing the appeal, the court specified that the reason for dismissal was that "the order appealed from is not appealable" (petitioner's appendix, page 4).

Since respondent believes that this Court lacks jurisdiction over the instant case since no federal question is involved, there would ordinarily be no need to discuss the facts bearing on the merits of petitioner's claim. Nevertheless, since the "Statement" in petitioner's brief contains several inaccuracies relating to the merits, respondent feels compelled to correct these misstatements.

Petitioner contends that the testimony at the preliminary examination supports the fact that the crime, if it occurred, took place in Illinois rather than in Wisconsin. This statement is patently erroneous. At the preliminary hearing on July 31, 1974, the victim expressly testified that the crime had occurred in Walworth County, Wisconsin (R. 28). She stated that she had returned to the scene the day after the crime with a police detective to show him the spot where the rape had occurred (R. 28). On cross-examination by defense counsel, she consistently repeated the description of the place where the crime had occurred (R. 40, 41, 44, 45). The defense presented no witnesses to refute her testimony and did not argue the point (R. 48). Contrary to petitioner's assertion, the testimony at the preliminary supported the fact that the crime occurred in Wisconsin, not in Illinois.

Petitioner implies that he attempted to employ Arthur Belkind as retained counsel only after Brian Riemer was dismissed as court-appointed counsel on February 15, 1975. In fact, Attorney Belkind was substituted for

Attorney Worth on January 9, 1974 (R. 140). This substitution was the express wish of the petitioner (R. 63). At this time the court admonished petitioner that local counsel would be required to serve with Attorney Belkind, who is from Chicago, Illinois (R. 140).

Despite the substitution of Attorney Belkind as petitioner's counsel, on January 17, 1975, petitioner again appeared without counsel and was given until January 20 to retain an attorney (R. 68-73). On January 20 he was given an additional week for the same purpose (R. 87-98). Petitioner again appeared without counsel on January 27, 28, and 29, and each time was reminded that a trial date would be set on Feburary 3 (R. 81, 106, 145). On Feburary 3, 1975, petitioner again appeared without counsel, at which time the court appointed Brian Riemer as his attorney. Trial was set for March 17 at 9:30 a.m. (R. 120). On February 18, Attorney Riemer was relieved as counsel because of the difficulties he experienced with the petitioner (R. 156-158). The petitioner was again advised of the date and time for trial (R. 154).

Petitioner's statement that local counsel could not be found in time for the trial date of March 17, 1975, is at best suspect. The trial date was set on February 3, 1975 (R. 120), which gave petitioner a month and a half to employ local counsel. Since petitioner appeared on February 3, 1975, without counsel, however, the judge appointed Attorney Riemer to represent him. There is no indication in the record that petitioner made a concerted effort to obtain privately retained local counsel between February 3, 1975, and the March 17 trial date. There is a strong indication in the record that petitioner, prior to his February 3, 1975 appearance, had contacted several potential attorneys but had not selected one due to his

own finickiness (R. 146). Thus, the statement that local counsel could not be found in time for the trial date is rather misleading.

ARGUMENT

Introduction

Although the argument portion of the petition is labelled "Reasons For Granting This Writ," no reasons for granting the writ are actually set forth therein. Instead, the petition repeats all of the arguments on the merits made to the Wisconsin Supreme Court in the petitioner's brief submitted to that court. The only significant difference is that on appeal to the Wisconsin Supreme Court, petitioner framed the issues in terms of the trial court's alleged abuse of discretion and never mentioned the Fourteenth Amendment to the United States Constitution. Although the petitioner inappropriately argues the merits of this case, the response will be limited primarily to stating why this Court should not grant the petition.

Rule 19 of the Supreme Court Rules sets forth the considerations governing review on certiorari. It indicates that, subject to its discretion, this Court will review the decision of the highest court of a state only when that court has decided a federal question of substance not previously decided by it or which was decided by the state court in a way probably inconsistent with applicable decisions of this Court.

The instant case does not fall within this description. Here, each of the questions raised was not even considered by the Wisconsin Supreme Court since that court dismissed petitioner's appeal on state

procedural grounds. Furthermore, in his brief to the Wisconsin Supreme Court, petitioner based his claims of trial court error not on alleged violation of Fourteenth Amendment rights, but rather on alleged abuse of the trial court's discretion.

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court Which Considered And Decided Only Questions Of State Law.

The jurisdiction of this Court to review by writ of certiorari the final judgment of the highest court of a state appears in 28 U.S.C. sec. 1257 (3), which provides that such review is appropriate where:

> ". . . the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Although the petitioner attempts to bring this case within the purview of the above statute, it is clear that no federal question was properly presented to or decided by the Wisconsin Supreme Court.

A. The Wisconsin Supreme Court was never properly presented with the question of whether the trial court denied petitioner due process under the Fourteenth Amendment by ordering the forfeiture of his bail bond and by denying its reinstatement.

Before the Wisconsin Supreme Court, the petitioner attempted to appeal the trial court's order decreeing the forfeiture of his bail bond and the trial court's order denying his request for reinstatement of the bond. Although petitioner's brief to the Wisconsin Supreme Court stated that the appeal was from an order of the Walworth County Court, entered March 17, 1975, forfeiting petitioner's bail bond, the notice of appeal which he filed claimed the appeal was taken from an order "entered" April 28, 1975 (R. 420). A search of the record reveals that no order was entered that day, but that a hearing was held on August 28, 1975, during which the court orally denied several motions of the petitioner, including those referred to in the notice of appeal (R. 423-473). One of these motions requested the trial court to reinstate petitioner's bail.

On February 20, 1976, the State moved to dismiss the appeal on three grounds, the first two of which were based on nonappealability of the trial court's order. On March 18, 1976, the Wisconsin Supreme Court granted the motion, stating that "the order appealed from is not appealable" (petitioner's appendix, page 3).

Although the Wisconsin court's order did not specify whether the lower court's order was nonappealable

because not reduced to writing or whether it was nonappealable because of its very nature, both grounds having been raised in the State's motion to dismiss, it is obvious that no federal question relating to forfeiture of the petitioner's bail was properly presented to or decided by the Wisconsin Supreme Court.

First, the petitioner could not have appealed the April 28, 1975, order of the county court since the order was not reduced to writing. (See generally sec. 270.53 (2), Wis. Stats., for the definition of an order, which indicates that reduction to writing is essential.) The well established rule in Wisconsin is that the order from which an appeal is taken must be reduced to writing. *State v. Powell* (1975), 70 Wis. 2d 220, 222, 234 N.W. 2d 345. Second, even if there had been a written order from which to appeal, petitioner would not be entitled to review since an order forfeiting bail is not appealable to a higher court. Section 59.07 (80), Wis. Stats., authorizes the county board to remit forfeited money when it has been forfeited for failure of the defendant to appear, but such failure is occasioned by a justifiable cause. Since the petitioner has not availed himself of the method of review which the legislature has prescribed, it cannot be said that he was properly presented the forfeiture of bail issue to the state's highest court.

Third, the petitioner has arguably even failed to present the bail issue to the Wisconsin Supreme Court in the form of a federal question. In his brief on appeal, petitioner merely referred to the trial court's "abuse of discretion" in the argument headings relating to the bond forfeiture ordered by the trial court. Not even passing reference to the Fourteenth Amendment appears in the petitioner's brief. Petitioner's only allegation that the trial court denied him due process in revoking his

bail appears at page 7 of his brief to the Wisconsin Supreme Court:

> ". . . The right to reasonable bail is based on the presumption of innocence and the right of personal liberty. Any denial or revocation thereof must meet the test of due process. ... The Trial Court, by the complete disregard for obtaining the person of the defendant, other than by a bench warrant, did not accord him his due process rights."

It is extremely doubtful whether the mere reference to "due process" is sufficient to raise a federal question for certiorari review. *Bowe v. Scott* (1914), 233 U.S. 658, 664-5, 34 S.Ct. 769, 58 L.Ed. 1141. This is particularly so where the state constitution has a due process clause (Wis. Const., Art. I, sec. 8), in which case a claim that "due process" has been violated will be deemed to relate to the state constitutional provision. *Bowe* at 664-5.

The foregoing argument demonstrates that, insofar as the first issue raised by petitioner is concerned, no federal question was ever properly presented to or decided by the highest court of the state. Since the Wisconsin Supreme Court dismissed petitioner's appeal solely on state grounds, this Court has no jurisdiction to review that court's decision. *Brinkerhoff-Faris Trust & Co. v. Hill* (1930), 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107. As this Court wrote in *Durley v. Mayo* (1956), 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178:

> " 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v Hanan, 300 US 14, 18; Lynch v New York, 293 US 52. ***' "

B. The Wisconsin Supreme Court was never properly presented with the question of whether the trial court deprived the petitioner of due process under the Fourteenth Amendment by refusing his request for a change of venue.

On appeal to the Wisconsin Supreme Court the petitioner also sought review of the trial court's denial of his motion for change of venue. On motion of the State, the Wisconsin Supreme Court dismissed the appeal on the ground that the order appealed from was not appealable. It is obvious that the court's decision on the change of venue issue rested solely on state grounds.

First, there was no written order denying the motion for change of venue. In his petition to this Court, petitioner makes no pretense that such an order ever existed. The only county court order which petitioner claims to have appealed from dealt with the forfeiture of petitioner's bail. Since the rule in Wisconsin is that appeals will lie only from written orders, *Powell, supra,* the decision of the Wisconsin Supreme Court on the change of venue issue rested only on state law grounds, and this Court has no jurisdiction to review the order by a writ of certiorari. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra.*

Second, even if there had been a written order denying the motion for change of venue, the rule in Wisconsin is that an order refusing a motion for change of venue is not an appealable order under sec. 274.33, Wis. Stats., which prescribes which orders are appealable to the Wisconsin Supreme Court. *Trossen v. Burckhardt* (1960), 9 Wis. 2d 304, 305, 100 N.W. 2d 918. Thus, the Wisconsin Supreme Court's decision also rested on an interpretation of state statute and did not decide a federal question.

In addition to the fact that petitioner attempted to appeal a nonappealable order to the Wisconsin Supreme Court, instead of waiting until a judgment was reached in the action, at which time he could also appeal denial of his motion for change of venue, it is also questionable whether the petitioner ever framed the change of venue issue as a federal question before the Wisconsin Supreme Court. In his brief to that court, the petitioner never once cited the Sixth or Fourteenth Amendments to the United States Constitution; instead, he relied almost exclusively on Wisconsin cases to show that the trial court abused its discretion in denying the motion for change of venue. The closest the petitioner came to raising a federal question was his invocation of this Court's decision in *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600. It is doubtful that this was sufficient to raise a federal question with respect to the change of venue issue.

The foregoing argument demonstrates that the petitioner never properly presented the change of venue issue to the Wisconsin Supreme Court in that he attempted to appeal from a nonappealable order and in that he failed to frame the issue as a federal question. Consequently, the Wisconsin Supreme Court dismissed the petitioner's appeal solely on state law grounds and never decided a federal question. Therefore, this Court lacks jurisdiction to review the change of venue issue by writ of certiorari.

C. The issue of whether the trial court erred in denying the petitioner's motion to dismiss for alleged lack of jurisdiction is not a federal question and was neither properly presented to nor decided by the state's highest court as a federal question.

The third issue raised by the petitioner is whether the trial court abused its discretion in denying his motion to dismiss for alleged lack of jurisdiction pursuant to sec. 939.03 (1) (a), Wis. Stats. Although petitioner, in the "Questions Presented" section of his petition, ostensibly frames the issue as one involving due process rights under the Fourteenth Amendment to the United States Constitution, it is apparent that the issue is only one of state law. In the argument section of his petition, petitioner contends only that the trial court abused its discretion in denying his motion to dismiss for lack of jurisdiction. The claim rests entirely on a state statute and is not premised on any federal right.

Similarly, before the Wisconsin Supreme Court, the jurisdictional issue was framed only as a question of state law. Even if the issue had been framed as a federal question, however, the issue was not properly presented to the state's highest court.

First, the trial court's denial of the motion to dismiss was never reduced to writing and was therefore not appealable to a higher court. See sections A and B of this brief and *State v. Powell, supra*. Second, even if the trial court's denial of the motion had been reduced to a written order, that order would not have been

appealable prior to entry of judgment in the case. On appeal, the petitioner argued that the courts of Wisconsin lack jurisdiction over petitioner since it was not established at the preliminary examination, to the required degree of certainty, that the crime occurred in Wisconsin rather than in the neighboring state of Illinois. What is challenged in fact is the sufficiency of the evidence presented at the preliminary and the magistrate's order binding petitioner over to the circuit court for trial. The law in Wisconsin is that an appeal does not lie from an order of a magistrate binding over the accused to a court of record. *State ex rel. Klinkiewicz v. Duffy* (1967), 35 Wis. 2d 369, 376, 151 N.W. 2d 63. Nor is an order of the trial court, which refuses to dismiss charges for insufficiency of the evidence at the preliminary, appealable. *State ex rel. Offerdahl v. State* (1962), 17 Wis. 2d 334, 336, 116 N.W. 2d 809. The Wisconsin Supreme Court recognized the nonappealability of the trial court's order denying the motion to dismiss when it dismissed an attempted appeal from that order. Obviously, the Wisconsin Supreme Court based its dismissal solely on the law in Wisconsin and did not decide a federal question in so doing.

For all of the above reasons the third issue presented by petitioner is not properly before this Court since it is not a federal question, despite petitioner's belated attempt to label it as such, and it was neither presented to nor decided by the state's highest court as a federal question. Thus, this Court has no jurisdiction to review the issue by a writ of certiorari. *Durley v. Mayo, supra*.

CONCLUSION

For the reasons heretofore stated, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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